

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs to Western Section on March 30, 2007

**JOHN PATRICK CUNNINGHAM, JR.**  
**v.**  
**MELISSA KAY CUNNINGHAM**

**An Appeal from the Chancery Court for Robertson County**  
**No. 17065     Laurence M. McMillan, Chancellor**

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**No. M2006-01187-COA-R3-CV - Filed on April 30, 2007**

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This is a post-divorce case involving child visitation rights with a stepparent. The mother and biological father of the child divorced in 1993 in Sumner County. Under the Sumner County divorce decree, the mother was designated the primary residential parent and the biological father was granted parenting time. The mother remarried. In 2002, the mother and the stepfather divorced in Robertson County. The mother and stepfather, the parties to this appeal, entered into a marital dissolution agreement that provided the stepfather visitation with the minor child. The agreement was incorporated into the Robertson County divorce decree. Two years later, a dispute arose regarding the stepfather's visitation. The stepfather filed a petition in Robertson County to enforce his visitation rights with the minor child. The biological father intervened, alleging that the Robertson County court did not have jurisdiction to address visitation matters related to the minor child. The trial court refused to address visitation matters for lack of jurisdiction, but enforced the parties' marital dissolution agreement by requiring the breaching party to pay attorney's fees. This decision was not appealed. Two months later, the stepfather filed another petition in the Robertson County court seeking reinstatement of visitation. The mother filed a motion to dismiss, asserting *res judicata*. The trial court denied the mother's motion and reinstated the stepfather's visitation. The mother now appeals. We vacate the order on visitation, finding that the Robertson County court did not have subject matter jurisdiction to adjudicate visitation matters relating to the minor child.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Vacated.**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

H. Scott Saul, Nashville, Tennessee, for Defendant/Appellant Melissa Kay Cunningham.

Rosemary E. Phillips, Goodlettsville, Tennessee, for Plaintiff/Appellee John Patrick Cunningham, Jr.

## OPINION

The parties to this appeal are Defendant/Appellant Melissa Kay Cunningham (“Mother”) and Plaintiff/Appellee John Patrick Cunningham (“Stepfather”), the mother and stepfather of Logan Donahue. Logan was born on January 21, 1992, during Mother’s first marriage to Logan’s biological father, John Fitzgerald Donahue (“Father”). As background, Mother and Father divorced in 1993. In their divorce decree entered in Sumner County, Tennessee, Mother was designated as primary residential parent; Father was ordered to pay child support and was granted parenting time with Logan on alternate weekends.

Subsequently, Mother married Stepfather. During the course of their marriage, Logan became a junior drag-racer and participated in a number of racing events, including the 2004 NHRA Junior DragRacing Championship. Stepfather shared Logan’s interest in drag racing and apparently participated with him in the racing events.

Mother and Stepfather later divorced. The divorce decree was entered on November 20, 2002, in the Robertson County Chancery Court. The Robertson County decree incorporated a Marital Dissolution Agreement (“Cunningham MDA”) between Mother and Stepfather which provided in part that Stepfather would have visitation with Logan every Friday night and Sunday during the racing season, “plus one day per week from after school for the evening to accommodate [Mother’s] work schedule.” In turn, Stepfather agreed to pay the expenses of the racing activities.

For about two years after the parties’ divorce, Logan continued to participate in drag-racing events. He visited Stepfather overnight on Thursdays after school. During the racing season, he stayed with Stepfather on Friday nights and occasionally on Sundays as well. In January 2005, Mother cut off Logan’s visitation with Stepfather and refused to discuss the matter with him.

On February 7, 2005, Stepfather filed a petition for contempt in the Robertson County Chancery Court, alleging that Mother was in willful contempt of their divorce decree. Stepfather asked the trial court to immediately reinstate his visitation with Logan and to require Mother to show cause why she should not be held in contempt.

The trial court held a hearing on March 10, 2005. At the hearing, Mother told the trial court that she wished to file an answer and counter-petition. The trial court ordered that Stepfather’s visitation be temporarily reinstated, and it set a show-cause hearing on the contempt allegation.

On April 18, 2005, Mother filed her answer and counter-petition. In her pleadings, Mother alleged that further visitation with Stepfather was not in Logan’s best interest, and that Logan’s

visitation with Stepfather interfered with Logan's visitation with Father. Mother requested that the trial court discontinue the visitation between Stepfather and Logan.<sup>1</sup>

On April 25, 2005, Mother filed a motion to amend Stepfather's visitation pendente lite. In this motion, Mother noted that she was divorced from Logan's biological father in the Sumner County General Sessions Court on June 14, 1993, and she attached to her motion a copy of the Sumner County divorce decree and the Marital Dissolution Agreement with Father ("Donahue MDA"). The Donahue MDA provided that Mother would have primary physical custody of Logan and that Father would have parenting time with his son at least every other weekend from Friday evening to Sunday evening.

Subsequently, on May 9, 2005 and May 16, 2005, respectively, Stepfather filed a response to Mother's motion and counter-petition. As to Mother's motion, Stepfather essentially argued that Mother did not have standing to assert Father's visitation rights. In response to Mother's counter-petition, Stepfather argued that his visitation did not interfere with Father's parenting time with Logan because Father attended Logan's racing events on Friday nights. In fact, Stepfather maintained, his Friday night visitation with Logan increased Father's ability to see Logan because, during the racing season, the racing events occurred every Friday night.

On May 20, 2005, Father filed an application to intervene in the Robertson County proceeding. Father asserted that he was actively involved in Logan's life, paid court-ordered child support, and had parenting time with Logan on a regular basis. He alleged that he was never consulted about the Cunningham MDA providing for Logan to have visitation with Stepfather, that Stepfather's visitation conflicted with his parenting time, and that the Robertson County court did not have jurisdiction to address visitation matters related to Logan. Father sought to intervene as of right pursuant to Rule 24.01 of the Tennessee Rules of Civil Procedure, maintaining that he and Mother were the proper persons to determine what was in Logan's best interest. The trial court granted Father's request to intervene.

On May 25, 2005, the trial court denied Mother's motion to dismiss. The matter was set for a final hearing on all issues on June 1, 2005. After hearing testimony and arguments of counsel, the trial court made the following findings of fact and conclusions of law:

The Court finds that there was no participation of the biological father with the Marital Dissolution Agreement between Mr. and Mrs. Cunningham in Robertson County Tennessee. The biological father has testified that he opposes racing and the visitation of the [stepfather] with the minor child. The mother opposes both racing and the visitation with the [stepfather]. As a result, the mother has refused the visitation with the stepfather since January 2005.

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<sup>1</sup>Following this, Stepfather filed a petition for criminal contempt, alleging that Mother continued to deny visitation after the March 10, 2005 hearing. Stepfather requested that Mother be incarcerated for ten days for each violation of the trial court's order.

. . . [T]he Marital Dissolution Agreement incorporated into the Final Decree in Robertson County Tennessee became a contract. The mother is in [breach] of that contract. Paragraph nine (9) of the Marital Dissolution Agreement states that if either party violates a provision of the Order, that party shall be responsible for the expenses, including the attorney's fees. It is the Court's opinion that the biological father did not participate in the contractual relationship in the Marital Dissolution Agreement in Robertson County Tennessee and that this Court, therefore, does not have subject matter jurisdiction over the visitation matters regarding the minor child. The Court does, however, have the right to enforce the contract.

The Court, therefore, concludes . . . mother shall be required to pay all of [Stepfather's] attorney['s] fees and all Court costs and expenses of this case. . . .

The Court finds that it does not have venue to discuss the best interest of the child. While the Court would note that from the child's testimony, the child clearly loves [Stepfather] dearly, the Court is not in a position to address the issues of visitation and the best interest of the child and, therefore, all other matters, other than as stated herein, are dismissed.

Thus, the trial court found that it did not have subject matter jurisdiction over visitation matters regarding Logan, but required Mother to pay Stepfather's attorney's fees and the court costs pursuant to the Cunningham MDA. The trial court's order was entered on July 22, 2005. There was no appeal from this order.

Two months later, on September 26, 2005, Stepfather filed another petition, this time asking the Robertson County Chancery Court to reinstate his Thursday visitation with Logan. Stepfather claimed that the trial court, in its July 22, 2005 order, found only that it could not address his visitation with Logan insofar as it conflicted with the biological father's parenting time. Stepfather maintained that the trial court did not address the issue of weekday visitation, which did not interfere with the biological father's scheduled parenting time. Accordingly, Stepfather asked the trial court to reinstate his Thursday visitation with Logan under the terms of the Cunningham MDA. Mother filed an answer to this petition on November 3, 2005, denying Stepfather's allegations.

On December 1, 2005, Mother filed a motion to dismiss, arguing that Stepfather's petition to reinstate visitation was barred by the doctrine of res judicata. Mother argued that Stepfather's interpretation of the July 22, 2005 order was "too narrow" and that the issue of Thursday visitation could have been litigated in the earlier proceedings. On this basis, she asked the trial court to dismiss Stepfather's petition. On March 13, 2006, the trial court entered an order denying Mother's motion to dismiss.

Subsequently, on May 15, 2006, the trial court entered a second order, stating:

This case is before the court for the second time to enforce step-parent visitation granted to the Step-Father by the Mother in a Marital Dissolution Agreement. The first time this matter was before the court, the Biological Father

testified that the step-parent visitation conflicted with his visitation, and the court was of the opinion that it should not enforce its order which would in effect deprive the Biological Father of his visitation with the minor.

This time, the Step-Parent argues that the portion of his visitation which does not interfere with the Biological Father's visitation should be enforced by this court. The court is of the opinion that because a portion of the Step-Parent's visitation does not conflict with the Biological Father's visitation, the Mother's agreement which is embodied in the Marital Dissolution Agreement and made an order of this court pursuant to the Final Decree, should be enforced to the extent it does not interfere with the Biological Father's visitation.

Thus, the trial court ordered that Stepfather's visitation for Thursday night be resumed. From this order, Mother now appeals.

Although neither party raises the issue of subject matter jurisdiction in this appeal, we are compelled to do so. Tenn. R. App. P. 13(b) (2005). The law regarding jurisdiction to make an initial child custody determination, or to modify a prior determination, is well-established in Tennessee. Section 36-6-101 of the Tennessee Code Annotated provides in relevant part:

(a)(1) In a suit for annulment, divorce or separate maintenance, where the custody of a minor child or minor children is a question, the court may, notwithstanding a decree for annulment, divorce or separate maintenance is denied, award the care, custody and control of such child or children to either of the parties to the suit or to both parties in the instance of joint custody or shared parenting, or to some suitable person, as the welfare and interest of the child or children may demand, and the court may decree that suitable support be made by the natural parents or those who stand in the place of the natural parents by adoption. *Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require.*

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(b) Notwithstanding any provision of this section to the contrary, the party, or parties, or other person awarded custody and control of such child or children shall be entitled to enforce the provisions of the court's decree concerning the suitable support of such child or children in the appropriate court of any county in this state in which such child or children reside; provided, that such court shall have divorce jurisdiction, if service of process is effectuated upon the obligor within this state. *Jurisdiction to modify or alter such decree shall remain in the exclusive control of the court that issued such decree.*

T.C.A. § 36-6-101(a)(1), (b) (2005) (emphasis added). As indicated by its express language, section 36-6-101(b) grants exclusive jurisdiction<sup>2</sup> to modify or alter a child custody decree to the court that makes the initial custody determination. *E.g.*, Janet Leach Richards, *Richards on Tennessee Family Law* § 7-2(b) (2d ed. 2004). This exclusive jurisdiction extends to virtually all matters relating to the custody of the child. *See, e.g., Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977) (“A court in which an action for divorce is brought and which renders a decree respecting the care, custody and support of minor children continues to have jurisdiction of such matters until the children reach majority.”).

In the instant case, the exclusive jurisdiction to address matters relating to Logan’s care and custody rests with the court that made the initial determination between Mother and Father, the Sumner County General Sessions Court. During the 1993 divorce proceedings between Logan’s biological parents, the Sumner County court designated Mother as primary residential parent and granted parenting time to Father pursuant to the Donahue MDA. At that point, Logan “became the ward” of the Sumner County court, and that court “retained jurisdiction of every question relative to the welfare of the child.” *Sutton v. Sutton*, 417 S.W.2d 786, 788 (Tenn. 1967) (citing *Williamson v. Laughlin*, 241 S.W.2d 576 (Tenn. 1951)). The Robertson County court appeared to recognize this in its July 22, 2005 order, observing, “this Court . . . does not have subject matter jurisdiction over the visitation matters regarding the minor child.”

Despite its earlier finding, the Robertson County court proceeded to adjudicate a visitation matter regarding the same minor child in its subsequent May 15, 2006 order. It apparently reasoned that, so long as its ruling did not conflict with the parenting time awarded to Father by the Sumner County court, it could enforce the parties’ contractual visitation agreement under the Cunningham MDA, which was incorporated into the Robertson County divorce decree. This was clear error.

Whether under the guise of enforcing a contract or any other legal theory, the Robertson County court, in its May 15, 2006 order, effectively modified<sup>3</sup> the initial custody determination of the Sumner County court. The Robertson County court was without jurisdiction to do so. Visitation by a non-parent is an issue which must be adjudicated by the court that initially determined custody. *Rowland v. Tate*, 797 S.W.2d 618, 622 (Tenn. Ct. App. 1990). As previously explained by this Court:

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<sup>2</sup>Exclusive jurisdiction is defined as a “court’s power to adjudicate an action or class of actions to the exclusion of all other courts.” Black’s Law Dictionary 856 (7th ed. 1999); *see also Rowland v. Tate*, 797 S.W.2d 618, 624 (Tenn. Ct. App. 1990).

<sup>3</sup>Although Tennessee’s Uniform Child Custody Jurisdiction and Enforcement Act does not apply in this case, the definitions therein are instructive. The Act defines a “child custody determination” as “a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child.” T.C.A. § 36-6-205(3) (2005). A “modification” is defined as a “child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.” T.C.A. § 36-6-205(11) (2005).

[V]isitation involves a brief exclusive custody [of a child] which must be subject to the exclusive control of the divorce court.

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The exclusive jurisdiction of the question as to whom the custody of a child should be awarded is in the court wherein the divorce was granted and the custody of the child first awarded. . . .

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. . . Statutory jurisdiction of a court to supervise and control the custodial welfare of a minor child is not to be . . . lightly ignored. The divorce court retains control of the issue of custody of this child so long as it is a minor.

*Id.* at 622-25 (citations omitted). Accordingly, we must vacate the trial court's order insofar as it adjudicates any matter regarding the custody or visitation of the minor child, Logan Donahue, for lack of subject matter jurisdiction.

All other issues presented in this appeal are pretermitted by this holding.

The order of the trial court is vacated, and the cause remanded for further proceedings consistent with this Opinion. Costs of this appeal are to be taxed one-half to Plaintiff/Appellee John Patrick Cunningham and one-half to Defendant/Appellant Melissa Kay Cunningham, and her surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE